Filed 3/1/19 C.G. v. Glendale Unified School Dist. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

C.G., a Minor, etc. et al., Plaintiffs and Appellants, v. GLENDALE UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B277157 (Los Angeles County Super. Ct. No. BC548787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Reversed.

Panish, Shea & Boyle, Brian J. Panish, Rahul Ravipudi, Erika Contreras; Esner Chang, & Boyer, Holly N. Boyer and Shea S. Murphy for Plaintiffs and Appellants.

Doumanian & Associates and Nancy P. Doumanian for Defendant and Respondent.

C.G. was sexually assaulted by her high school teacher Delvon Christopher Jackson (Jackson). Through her guardian ad litem, C.G. sued the Glendale Unified School District (the District), among others,[1] seeking to hold it liable for the negligence of its employees in failing to protect her and for inadequately screening Jackson before hiring him. The District moved for summary judgment on the ground that C.G. named no statute that imposed a duty of care on the District and the undisputed facts established that the District's employees exercised reasonable care in protecting C.G. and in hiring and supervising Jackson. The trial court granted the motion and C.G. appeals from the judgment dismissing the District from her lawsuit. We conclude that the District failed to carry its burden on summary judgment to show indisputably that it had conducted any background check of Jackson's sexual proclivities. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. C.G.'s lawsuit against the District

Jackson sexually abused C.G. in the fall of 2013 when she was a 14-year-old 9th-grader in Jackson's public services class. The public service class is a Regional Occupational Program (ROP) designed to expose high school students to careers in technical fields such as firefighting and policing.

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[1] C.G. also sued the County of Los Angeles, the Los Angeles County Office of Education (LACOE) and Jackson, none of whom is a party to this appeal. LACOE obtained judgment on the pleadings and C.G. has filed a separate appeal from that judgment (B278093).

Early in the academic year, Jackson engaged in inappropriate sexual behavior with C.G. behind closed doors in his classroom and in the school's weight room. On October 14, 2013, after the fourth assault, C.G. reported the conduct to her coach at the close of soccer practice. The next morning, high school administrators called C.G. to the office and asked her about the events. The District immediately removed Jackson from the school and terminated him from employment. C.G. never saw Jackson again until she testified at his sentencing hearing.[2]

C.G. commenced this action against the District and its employees, identified as Does 1 through 50, seeking to hold them liable for, among other things, the negligence of its employees on the basis of Government Code sections 815.2, 815.4, 820, subdivision (a), and Civil Code section 1714, arising from a special relationship the District has with its students. C.G. relied on three distinct duties of care: The first is the duty of the District and its employees to all reasonably foreseeable people, including C.G., to monitor, supervise, and ensure the safety of students on its campus. The second duty of care is the obligation to monitor and supervise instructors adequately to protect the District's students from reasonably foreseeable harm caused by unfit and dangerous individuals it hires. The third duty of care is the responsibility to adequately investigate, screen, hire, and monitor teachers. C.G. also alleged the District and its employees breached a mandatory duty imposed by Education

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[2] Jackson pled no contest to committing lewd acts on a child (Pen. Code, § 288, subd. (c)(1)), a felony. The court sentenced Jackson to three years in state prison and ordered him to register as a sex offender.

Code sections 44830 and 44830.1, to screen, to investigate, to evaluate, to place instructors, and to protect students. Breach of these duties exposed C.G. to Jackson and proximately caused her injuries, she alleged.

II. The District's motion for summary judgment or in the alternative, summary adjudication

The District argued it was indisputable that C.G.'s harm was not caused by "any alleged negligence of the School District" in either supervising C.G. or hiring Jackson. The District also argued that C.G. failed to provide a statutory basis for a duty of care, and that there was no triable issue that the District's employees exercised *reasonable* care in hiring and supervising Jackson. Additionally, the motion argued that C.G. failed to name the District employee who was negligent.

Turning to the District's factual showing, it first presented the process for credentialing teachers and ROP instructors, which is facilitated by LACOE, and which must be done before an applicant may teach in the classroom. The District does not grant ROP credentials; that is the job of the commission on teacher credentialing (the Commission). The Commission issues a preliminary career technical education credential (CTE), which enables the applicant to teach in an ROP program while completing the three-year program to obtain a clear CTE credential. The preliminary CTE notifies school districts that the candidates qualify for clear CTE credentials and are in the process of obtaining them.

The District processes ROP-instructor applications by making offers of employment to candidates after they have applied for a CTE credential, if the candidates are not already credentialed. Once the preliminary CTEs are obtained, the

District fingerprints the candidates, tests them for tuberculosis, and submits them to a physical. Jackson filed his application for a preliminary CTE with LACOE who submitted it on his behalf to the Commission. His paperwork identified his prior employment as a security guard for the District with Ingram Security and Patrol, Inc., and his work as a "Special Enforcement Officer" with the City of Inglewood, where his responsibilities were to enforce parking laws and state Vehicle Codes. Jackson obtained a Department of Justice clearance indicating he had not been convicted of a violent or serious felony such as would disqualify him from employment under Education Code section 44830.1. No subsequent notice of any conviction was received before C.G.'s allegations.

With respect to the District's hiring of Jackson as an ROP instructor, Maria G. Gandera, who has been the District's assistant superintendent of human resources since 2012, after Jackson was hired, declared that Jackson "submitted his application to work as an ROP Instructor to the . . . District on or about August 22, 2011. The . . . District confirmed that Jackson's preliminary CTE credential was valid and active." (Capitalization omitted.) The District also independently ran a Live Scan analysis on Jackson's fingerprints through the Department of Justice, which just as the Commission found, revealed no criminal convictions that disqualified him from employment as an ROP instructor. Gandera did not produce the live scan. Nor did her declaration discuss what steps the District took to verify Jackson's employment history, or to investigate whether there were any indications he posed a risk to students.

Gandera testified in deposition that the District has a duty to ensure that teachers and other staff do not pose a threat to the

children under its supervision. She knew of no District policies concerning supervising teachers on school grounds. The District evaluates teachers biannually and gives feedback or retrains, if necessary.

Neither Jackson's department chair, teacher Kristine Lowe, nor the District received any complaints from any student, parent, or employee about Jackson, nor did they have knowledge of any sexual misconduct or other inappropriate behavior by Jackson perpetrated on any student of the District before C.G. came forward with her allegations.

III. C.G.'s opposition

C.G. disputed any implication by the District that it did not have its own hiring process. C.G. submitted the deposition of Principal Jennifer Earl, Ed.D., who explained that she and two vice principals recommended Jackson for the ROP instructor position. Earl and Associate Principal Hagop Eulmessekian took Jackson at his word that he was a former police officer. They would not have hired him had they known he was never a police officer.

Eulmessekian stated that "any teacher . . . before going into the classroom, including [himself] when [he] was being hired, [would] have to have a background check" "[t]o make sure that the person has a clean record," and for the safety of everyone on campus. No one at the high school conducted a background check of Jackson or verified whether he had been employed as a police officer. Everyone relied on human resources at the District level. Earl expected that the District had verified Jackson's employment history. Eulmessekian testified that the presumption is that once the District clears candidates, they are safe to engage with students.

However, the District's motion contained no evidence that any of its employees verified Jackson's employment history. No one from the District called the Inglewood Police Department to confirm whether Jackson was a police officer. Jackson's supervisor in Inglewood, Lieutenant Cochran, would have informed the District that Jackson had been fired from his job as a parking attendant "for making sexual innuendoes to the public, to a couple of women." C.G. submitted evidence that Jackson had a rap sheet showing he had been convicted in 1995 of misdemeanor battery (Pen. Code, §§ 242 & 243, subd. (a)). Eulmessekian learned—after Jackson molested C.G.—that there was domestic violence in Jackson's past.

The District's personnel understood that everyone has a duty to ensure child safety on campus, by supervising both students and people who interact with students. Thus, at the beginning of every year Earl has a list of "reminders," which includes "don't be alone with a student for your own protection, for their protection." She "put things in place," "guidelines," "to assure that there is no formal reason a student and a teacher should be alone," and reminded teachers to have someone in the room when they have private conversations with students, and always keep the door open so administrators can see what is happening. Earl has these guidelines so that teachers could not take advantage of students.

C.G.'s expert in educational administration and educator sexual misconduct, Charol Shakeshaft, Ph.D., evaluates school policies and practices related to the prevention of educator misconduct. Shakeshaft declared that sexual exploitation of children by school staff is one of the known and potential harms that a school employee can cause. Shakeshaft explained that

school districts need to have clear policies and regulations that describe educator sexual abuse; detail acceptable and unacceptable behavior; provide mechanisms for reporting, guiding students, teachers, and others in prevention; and describe a system of investigation and consequences.

The District should have policies to "make it clear that the entire school family is responsible for identification and reporting" sexual exploitation, Shakeshaft asserted. "These polices should require training of all personnel . . . [to be] aware of red flags of grooming and prohibitions against being alone . . . with a child in a closed or locked room." There should also be a written policy that covers the teacher-student relationship. Broader than simply "you can't have sex with students," that policy should define what is and is not acceptable: "Whether or not you can take students in cars, whether or not you can be in locked rooms with students, whether or not you can hug [a] student and touch students." A teacher should never be left alone in a classroom with a student. Shakeshaft was struck by the fact that none of the District's personnel who were deposed in this case believed that the District had policies for preventing or reporting sexual abuse of children or polices that provided guidelines for staff-to-student interactions and behavior.

Nevertheless, the trial court granted the District's summary judgment motion. It reasoned that C.G. failed to allege a statutory basis for the alleged duties. The court concluded C.G. failed to dispute that the District's employees had no information that Jackson was a danger to students until he molested C.G. The court acknowledged Shakeshaft's declaration that the District's hiring, supervision, and training policies did not meet current standards for prevention of sexual abuse of students, but

ruled that this testimony was immaterial to the issues in the motion because it did not tend to show knowledge on the part of the District's employees. C.G. filed the instant appeal from the ensuing judgment dismissing her complaint.

DISCUSSION

I. Standard of review

" 'A trial court properly grants summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." ' " (*Delgadillo v. Television Center, Inc*. (2018) 20 Cal.App.5th 1078, 1085 (*Delgadillo*).)

" 'A defendant who moves for summary judgment [has] the initial burden to show the action has no merit—that is, "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to [that] cause of action." (Code Civ. Proc., § 437c, subds. (a), (p)(2).) [If] the defendant meets this initial burden of production, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. [Citation.] "From commencement to conclusion, the moving party defendant bears the burden of persuasion that there is no triable issue of material fact and that the defendant is entitled to judgment as a matter of law." ' " (*Delgadillo*, *supra*, 20 Cal.App.5th at p. 1085.)

We review appeals from summary judgments de novo. We " 'liberally construe[] the evidence in favor of the party opposing

the motion and resolv[e] all doubts about the evidence in favor of the opponent. [Citation.] We consider all of the evidence the parties offered in connection with the motion, except that which the court properly excluded.' " (*Delgadillo*, *supra*, 20 Cal.App.5th at p. 1085.)

II. General duties of school districts to students

A school district's liability for negligent hiring and supervision involves a three-part analysis. "We must first determine whether the District had a duty to protect its students from sexual assaults by teachers in its employ. We must then consider whether there is a statutory basis for the District's liability, and finally, whether the District is immune from liability." (*Virginia G. v. ABC Unified School Dist*. (1993) 15 Cal.App.4th 1848, 1853 (*Virginia G.*).) The District's motion did not discuss immunity, the third part of the analysis, and so we do not address it.

A. *The special relationship doctrine and the District's duty of care to its students*

Turning to the first of the three-part analysis, as our Supreme Court explained, " 'While school districts and their employees have never been considered insurers of the physical safety of students, California law has long imposed on school authorities a duty to "supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citations.]" [Citations.] The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care "which a person of

ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances." [Citations.] Either a total lack of supervision [citation] or ineffective supervision [citation] may constitute a lack of ordinary care on the part of those responsible for student supervision.' " (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869 (*Hart*).)

This duty of school districts and their employees includes within its scope the responsibility "to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally." (*Hart*, *supra*, 53 Cal.4th at p. 870.) Such a duty arises from the special relationship school districts and their employees have with the district's pupils, beyond that which each of us generally owes to others under Civil Code section 1714. This "protective duty is appropriate in light of the fundamental public policy favoring measures to ensure the safety of California's public school students." (*Hart*, at p. 870 & fn. 3.)

Of course, "[t]he existence of a duty of care of a school district toward a student depends, in part, on whether the particular harm to the student is reasonably foreseeable." (*M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 518 (*M. W.*).) Foreseeability, for purposes of determining the scope of duty, "is determined in light of all the circumstances and *does not require prior identical events or injuries*." (*Id.* at p. 519, italics added.) The "court's task in determining whether there should be a duty, vel non, '. . . is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the

kind of harm experienced that liability may appropriately be imposed on the negligent party.' " (*Jennifer C. v. Los Angeles Unified School Dist*. (2008) 168 Cal.App.4th 1320, 1329, italics omitted.)

The duty of care of school districts to protect students from foreseeable injury "has been applied in cases of employees' alleged negligence resulting in injury to a student by another student [citations] and injury to a student by a nonstudent." (*Hart*, *supra*, 53 Cal.4th at p. 870.)

More important, this duty of care applied in *Virginia G.*, *supra*, 15 Cal.App.4th 1848, a case involving injury to a student resulting from the teacher's sexual assault. (*Id*. at pp. 1851–1855.) *Virginia G*. reversed a judgment on the pleadings after determining that the defendant school district could be held vicariously liable for the negligence of school personnel in performing an inadequate background check of Ferguson before hiring him as a teacher. Ferguson was previously fired from another school for sexual misconduct with students and then sexually assaulted the plaintiff. (*Id*. at p. 1851.) Careful to emphasize that the teacher's "conduct in molesting Virginia G. [is] not [to] be imputed to the District," the *Virginia G.* court held however, "if individual District employees responsible for hiring and/or supervising teachers knew or should have known of Ferguson's prior sexual misconduct toward students, and thus that he posed a reasonably foreseeable risk of harm to students under his supervision, including Virginia G., the employees owed a duty to protect the students from such harm." (*Id*. at p. 1855.)

B. *The statutory basis for liability of public entities such as school districts*

Turning to the second part of our analysis, " 'in California, all government tort liability must be based on statute.' " (*Virginia G.*, *supra*, 15 Cal.App.4th at p. 1853; Gov. Code, § 815.)

Government Code section 820, subdivision (a) reads in part, that except as otherwise statutorily provided, "a public employee is liable for injury caused by his act or omission to the same extent as a private person." Subdivision (a) of section 815.2 of the Government Code provides, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . have given rise to a cause of action against that employee." " 'Thus, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person ([*id.*,] § 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes ([*id.*,] § 815.2, subd. (a)) to the same extent as a private employer ([*id.*,] § 815, subd. (b))." ' " (*Virginia G.*, *supra*, 15 Cal.App.4th at p. 1854.)

The Supreme Court in *Hart*, *supra*, 53 Cal.4th 861 held that the school district could be held vicariously liable under section 815.2, subdivision (a) of the Government Code for the negligence of its supervisory or administrative personnel if those employees knew or should have known of a counselor's propensities and nevertheless hired, retained, and inadequately supervised the counselor. (*Hart*, at pp. 865 & 869–870.) We apply these principles to this case.

III. Summary judgment/adjudication of C.G.'s complaint

A. *Negligent hiring of Jackson*

The issues to be addressed on summary judgment or adjudication are framed by the pleadings. (*Van v. Target Corp*. (2007) 155 Cal.App.4th 1375, 1387.) Turning to the second cause of action for negligent hiring, retention, supervision, or training, the District argued and the trial court agreed that C.G. failed to cite a statute imposing a *mandatory duty* on the District in hiring and credentialing Jackson. The court listed each of the statutes cited in C.G.'s complaint and concluded that none of them imposed such a mandatory duty.

However, the trial court overlooked that C.G.'s complaint alleges, in addition to the statutes analyzed by the court, that Does 1 through 50 were employees of the District and "act[ed] within the course, scope, and authority of said . . . employment."[3] C.G. alleges that the District "owed a duty of care to the public, including [her], in the investigating, screening, hiring, training, monitoring, placing, evaluating and supervising of their . . . employees." The District was "negligent and reckless in the investigating, screening, hiring" and "failed to perform and/or negligently and recklessly performed the required screening and background check on JACKSON and knew or should have known

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[3] The District argued that C.G. failed to plead and name those of its employees who owed a duty to C.G. Although this case is well beyond the pleading stage, we note that C.G. did allege that Does 1 through 50 were employees of the District and were acting in the course and scope of their employment. The depositions and declarations submitted in support of and in opposition to the motion for summary judgment identify the names of employees who were involved.

that JACKSON . . . posed a danger to students and [the] . . . High School." C.G. cites Government Code sections 815.2 and 820, subdivision (a), and Civil Code section 1714. Thus, C.G. relies on the same special relationship with students and concomitant duty on the part of the District's employees, and cites the same statutory foundation for public entity vicarious liability, as had the successful plaintiffs in *Virginia G.* and *Hart*.

In the factual showing of its motion, the District focused on compliance with the credentialing portion of the hiring process. The District showed that both it and LACOE confirmed through the Department of Justice that Jackson did not have a *serious or violent* criminal conviction that would disqualify him under Education Code section 44830.1 from obtaining a CTE credential.[4] Jackson had a valid and active ROP CTE credential. His job as a security guard and in parking enforcement in Inglewood qualified him for an ROP CTE credential. The District trained Jackson in sexual harassment prevention and never received reports of inappropriate activity before C.G. reported it to her soccer coach. Thus, the District argues, it complied with Education Code section 44830, which authorizes it to employ

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[4] At the time of C.G.'s abuse, former Education Code section 44830.1 provided in pertinent part, "no person who has been convicted of a violent or serious felony shall be hired by a school district in a position requiring certification qualifications or supervising positions requiring certification qualifications. A school district shall not retain in employment a current certificated employee who has been convicted of a violent or serious felony." Violent and serious felony for purposes of this statue are those listed in Penal Code sections 667.5, subdivision (c) and 1192.7, subdivision (c). (Ed. Code, former § 44830.1, subds. (a) & (c).)

"only persons who possess the qualifications for those positions prescribed by law."

Absent from the District's motion, however, are facts about any investigation that its personnel conducted into Jackson's *employment history and other background*. Although Earl and Eulmessekian recognized that all teachers were required to undergo a background check before going into the classroom, everyone at the high school expected that the screening had been done. Gandera's declaration, on which the District's motion relied, did not discuss any effort the human resources office made to verify Jackson's employment in Inglewood or to ascertain other background information such as the reason he left his Inglewood job. Had the District's personnel spoken to Jackson's supervisor Cochran at the Inglewood Police Department, they would have learned that Jackson was never a police officer as he had represented; he was a parking attendant who had been fired for making sexual overtures to women. The District did not produce the live scan it claims it conducted of Jackson, which would have shown that Jackson was never a police officer and that he had a misdemeanor battery conviction. And, there was domestic violence in his past. Although this criminal past did not disqualify Jackson under Education Code section 44830.1 from obtaining a CTE credential because he had no violent or serious felony conviction, it constitutes part of his background that would give the District's personnel notice of his proclivities.

The District was careful in moving for summary judgment to demonstrate that it only learned of Jackson's past *after* C.G. made her complaint to the soccer coach. Just so. In focusing on credentialing and Education Code section 44830, the District omitted to address what its own employees *should have known*

from verifying Jackson's employment and background *before* hiring him.

The District objected that C.G.'s evidence of Jackson's background was inadmissible hearsay because those facts were gleaned from the deposition testimony of Officer Torres, the Glendale police officer investigating C.G.'s allegations. The trial court abused its discretion in sustaining that objection. (*Jennifer C. v. Los Angeles Unified School Dist.*, *supra*, 168 Cal.App.4th at p. 1332.) The evidence is not hearsay because C.G. did not submit it for the truth of the matter, but for purposes of notice: The live scan, criminal history, and Cochran's statements provide facts that the District's personnel *should have known* had they investigated. Moreover, the District's own employees testified that, had personnel learned Jackson was never a police officer, they would not have hired him to work in the classroom. Had they known of his past, they would have been concerned for the safety of students.

Therefore, a reasonable factfinder could conclude that had the District's employees conducted a basic background check of Jackson for more than simply the disqualifying felony convictions listed in Education Code section 44830.1, they would have uncovered a past that the District's employees acknowledged would have precluded them from hiring Jackson as a teacher. Had he not been hired, he would not have had the opportunity to sexually abuse C.G. (Cf. *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1137–1138 [had defendants conducted criminal background check of coach, prior domestic violence conviction would have prevented coach from being hired and foreclosed opportunity to sexually abuse plaintiff].) The District failed to carry its initial burden in moving for summary

adjudication to demonstrate indisputably that it investigated and performed an adequate background check on Jackson before hiring him as a high school instructor. The burden never shifted to plaintiff to demonstrate a triable issue of fact. Therefore, the trial court erred in granting summary adjudication of the second cause of action based on the negligent investigation and hiring of Jackson under Government Code sections 815, 815.2, 820, and Civil Code section 1714.

B. *Failure to protect C.G.*

Distinct from the theory of liability based on negligence in investigating and hiring Jackson, C.G.'s complaint also alleges in the first cause of action that the District and Does 1 through 50 were negligent in failing to supervise and to protect C.G., thereby exposing her to Jackson. The District moved for summary judgment arguing that C.G.'s harm was not caused by any negligence on its part in failing to ensure C.G.'s safety[5] because it had no actual or constructive notice of any deviant sexual proclivities of Jackson. The motion relied on the fact that the District received no complaints from any teacher, parent, or student about *Jackson* in the years that he worked for the District and there is no evidence of other victims.

However, the summary judgment motion did not address the constructive knowledge of the District's employees, i.e., what

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[5] The District argued, as it had with respect to the negligent hiring cause of action, that C.G. failed to allege a statutory basis for holding it liable. Not so. C.G.'s first cause of action relied on Government Code sections 815.2, 815.4, 820, subdivision (a), and Civil Code section 1714, just as was determined by *Virginia G.* and *Hart* to serve as the proper basis for public-entity vicarious liability.

they should have known. As explained above, Jackson's criminal and employment background was knowable to the District's personnel had they conducted a background check during the hiring process. Students spending time with Jackson under such a cloud would be subject to closer supervision. Had Earl known of Jackson's illegal activity, she and Eulmessekian would have been concerned for the safety of students. In light of this imputed knowledge, the District's motion does not demonstrate that its supervision of C.G. was reasonable. Accordingly, the District failed to carry its burden in moving for summary adjudication of the first cause of action and so the burden never shifted to C.G. to demonstrate a triable factual issue. The trial court erred in granting summary adjudication of the first cause of action based on Government Code sections 815.2, 815.4, 820, subdivision (a), and Civil Code section 1714

DISPOSITION

The judgment is reversed. Appellants are awarded their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.